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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

DAVID and KATJA STREETER,

Plaintiffs,

v.

USAA GENERAL INDEMNITY
COMPANY and JOHN DOES 1-10,

Defendants.

Case No. 9:20-cv-00188-DLC-KLD

**USAA GENERAL INDEMNITY
COMPANY'S BRIEF IN SUPPORT
OF MOTION TO ALLOW REPLY
OUT OF TIME**

Defendant USAA General Indemnity Company (“USAA GIC”) files this brief in support of its motion to allow its Reply out of time.

INTRODUCTION

Due to an oversight, counsel for USAA GIC believed the Reply in Support of Motion to Exclude Testimony of William Whalen was filed prior to the Friday September 9, 2022, deadline. Undersigned counsel did not learn until Tuesday,

September 13, 2022, that the reply had not been filed. USAA GIC promptly filed the reply and now moves the Court to allow the out-of-time filing.

ARGUMENT

Pursuant to Fed. R. Civ. P. 6(b), the court may extend an expired deadline for good cause “if the party failed to act because of excusable neglect.” Although mistakes construing rules are not generally considered excusable neglect, “[I]n applying Rule 6(b), the Courts of Appeals have generally recognized that “excusable neglect” may extend to inadvertent delays.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 391–92 (1993). In deciding whether a party’s actions constitute excusable neglect, the court considers factors such as (1) prejudice to the opposing party, (2) “the length of delay and potential impact on judicial proceedings,” (3) “the reason for the delay,” and (4) “whether the movant acted in good faith.” *Id.* at 395. The Ninth Circuit applies these factors to Rule 6(b). *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997).

Here, Plaintiffs will not be prejudiced by the filing of the Reply because no response is allowed by Plaintiffs. Second, a delay of two business days will not impact the proceedings or the Court’s ability to resolve the Motion on the merits. Third, undersigned counsel prepared the reply and believed it had been filed on Thursday, September 8, 2022, one day early. However, only USAA GIC’s reply in support of its motion to continue trial (Doc. 126), was filed, not the Reply in

support of USAA GIC's Motion to Exclude Testimony of William Whalen on that day. Undersigned counsel takes full responsibility for this inadvertence and for the miscommunication that led to only one reply being filed on Thursday and not both. However, undersigned counsel intended to file the Reply and thought the Reply had been filed. Fourth, this motion is brought in good faith. On September 13, 2022, in compiling filed pleadings to send to USAA GIC, it was discovered that the Reply had not yet been filed, and it was promptly filed. (Doc. 133.)

Based on the circumstances in this case and short delay in filing, USAA GIC submits that excusable neglect exists here and requests the Court allow the out-of-time reply.

CONCLUSION

WHEREFORE, USAA GIC requests the Court allow the now-filed Reply in Support of its Motion to Exclude Testimony of William Whalen (Doc. 133) pursuant to Fed. R. Civ. P. 6(b).

Dated: September 14, 2022

Respectfully submitted,

s/ Jeremy A. Moseley

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Indemnity Company

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct. Executed on the 14th of September, 2022.

s/ Jeremy A. Moseley

Jeremy A. Moseley

CERTIFICATE OF COMPLIANCE WITH L.R. 7.1(D)(2)

Pursuant to Local Rule 7.1(d)(2), USAA General Indemnity Company certifies its compliance with the rule. This brief contains 466 words, excluding the caption and this certificate of compliance.

Dated: September 14, 2022

Respectfully submitted,

s/ Jeremy A. Moseley

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on September 14, 2022, I electronically filed the foregoing **USAA GENERAL INDEMNITY COMPANY'S BRIEF IN SUPPORT OF MOTION TO ALLOW REPLY OUT OF TIME** on the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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